No. 14,657

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EXCHANGE LEMON PRODUCTS COMPANY, a Corporation,
Appellant,

vs.

THE HOME INSURANCE COMPANY, a Corporation,
Respondent.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Pursuant to Rule 18 of the above entitled Court, Appellant Exchange Lemon Products Company, presents herewith its opening brief in the above entitled action.

Jurisdiction.

District Court. This is a diversity case (Title 28, §1332, U. S. Code) wherein Respondent The Home Insurance Company is a New York corporation [Complaint, Par. II, Tr. p. 3*] and Appellant Exchange Lemon Products Company is a California corporation. [Complaint, Par. III, Tr. p. 4.] The amount involved, to wit: $161,-

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*All transcript references are to pages in the printed Transcript of Record.

991.63 [Amended Counterclaim, Par. VI, Tr. p. 13; Pretrial Order, Tr. p. 18], is in excess of $3,000.00, exclusive of interest and costs of suit.

Court of Appeals. This appeal is from a final judgment entered December 30, 1954. [Tr. p. 75.] The appeal to this Court is pusuant to Title 28, Section 225(a) of the United States Code. Notice of appeal was duly filed on January 4, 1955. [Tr. p. 76.] Appellant's statement of points to be relied upon, which was filed on said date in the District Court [Tr. p. 77], has been adopted in this Court. [Tr. p. 79.]

Statement of the Case.

This is an action for declaratory relief brought by the Respondent, hereinafter referred to in this brief as "Home Insurance," against its insured, the Appellant, hereinafter referred to in this brief as "Exchange Lemon." A counterclaim based on the insurance policy which is the subject of the declaratory relief complaint was filed by Exchange Lemon against Home Insurance. A jury trial was demanded. [Tr. p. 7.]

By the allegations of its Amended Answer [Tr. p. 8] and Amended Counterclaim [Tr. p. 10] Exchange Lemon specifically pleaded the existence of trade usage relating to the critical terminology in the insurance contract. [Amended Answer, Par. II, Tr. p. 8; Amended Counterclaim, Par. IV, Tr. p. 12.]

In order to allow this Court to fully understand the significance of the trade usage involved, a narrative state-

ment taken from the pretrial memorandum of Exchange Lemon (not a part of the Transcript of Record), is attached as an appendix hereto.

In the Pretrial Order [Tr. p. 17] it was stipulated that among the issues of law were the questions of (1) the existence of ambiguity in the terms of the policy [Tr. p. 21], and (2) the right of Exchange Lemon to introduce testimony relating to the trade usage as pleaded. [Tr. p. 20.] It was stipulated that if the Court ruled that Exchange Lemon could introduce testimony on the issue of trade usage, several questions of fact were presented by the pleadings. [Tr. pp. 19-20.]

The District Court in its decision [Tr. p. 66], which serves as findings and conclusions pursuant to Rule 52(a) F. R. C. P. [Tr. p. 72], held that:

> (a) "The language of the contract is unambiguous and is fairly susceptible of but one interpretation." [Tr. p. 72]; and
>
> (b) "Sustained Home Insurance's objection to Exchange Lemon's offer of evidence of trade usage, and held that there were no issues of fact to be submitted to a jury." [Tr. p. 67.]

Exchange Lemon made a full written offer of proof [Tr. p. 36], and the Court thereupon entered its judgment declaring that Home Insurance had no liability on the insurance contract and that Exchange Lemon should take nothing by its counterclaim. [Tr. p. 73.]

The questions thus raised on this appeal relate to the District Court's decision to not submit the case to a jury,

its holding as a matter of law that the insurance contract was not ambiguous, and its holding as a matter of law that evidence of trade usage could not be presented.

Specification of Errors.

(1) *The Court erred in refusing to impanel a jury or to allow introduction of any evidence.* In view of the Court's ruling, no jury was impaneled, no trial was had, and no evidence was introduced. Exchange Lemon, however, made a formal written offer of proof consisting of the testimony of Tom Borden [Tr. pp. 36-50], C. S. Connelly [Tr. pp. 51-55], Harold S. Scott [Tr. pp. 55-59] and a portion of the deposition of James S. Jennings. [Tr. pp. 60-65.]

(2) *The Court erred in refusing to allow introduction of evidence on the issue of trade usage.* The pleadings and offer of proof establish that Exchange Lemon was engaged in the transportation trade as a shipper. [Tr. p. 11 (Amended Counterclaim, Par. II); Tr. p. 47 (Borden); Tr. p. 52 (Connelly)]; and Home Insurance was engaged in the business of issuing transportation insurance policies to shippers [Tr. pp. 22-28] and its agent who wrote the policy in question had full knowledge of the particular trade usage. [Tr. p. 12 (Amended Counterclaim, Par. IV); Tr. p. 64 (Jennings).]

(3) *The Court erred in refusing to allow introduction of evidence on the issue of ambiguity of the insurance contract.* The following language from the Transportation Policy contains an inherent ambiguity:

"This policy covers while the insured property is in due course of transit on any truck, trailer, railroad car, or other conveyance, whether such vehicles are owned by Assured or not. This policy also covers while on docks, wharfs, piers, bulkheads, in depots, warehouses, stations and/or on platforms, but only while in due course of transit and not if such property is in storage." [Tr. p. 23.]

The ambiguity arises from the coverage of the goods in "warehouses" although not "while in storage." The ambiguity is emphasized and heightened if the above quoted language is laid against the quoted language in the second defense in the Answer by Home Insurance to the Amended Counterclaim. [Tr. p. 15.]

Summary of Argument.

(1) *The Court erred in refusing to impanel a jury or to allow introduction of any evidence.*

(a) Exchange Lemon interposed a demand for jury trial and had a right to the same on all issues of fact.

(b) The District Court necessarily made determinations of factual issues in its decision, findings and conclusions.

(c) Exchange Lemon's offer of proof demonstrates the error in the District Court's refusal to admit evidence or impanel a jury.

(2) *The Court erred in refusing to allow evidence on the issue of trade usage.*

(a) Exchange Lemon is engaged in the transportation trade.

(b) Home Insurance, as an insurance company, is charged with knowledge of the usages of the trade insured.

(c) Home Insurance had actual knowledge of the trade usage.

(3) *The Court erred in refused to allow evidence on the issue of ambiguity.*

(a) The insurance contract was ambiguous on its face.

(b) The ambiguity was emphasized in the Home Insurance's pleadings.

(c) The insurance policy is to be construed against the insurer in the event of ambiguity.

(d) Exchange Lemon offered evidence to cure the ambiguity.

ARGUMENT.

1. The Court Erred in Refusing to Impanel a Jury or to Allow Introduction of Any Evidence.

The Court by its decision totally denied Exchange Lemon the opportunity to introduce proof at a trial in support of its pleadings and allegations. In doing this, the Court erroneously proceeded on the theory that there were no issues of fact involved in the case but only questions of law, all of which it decided adversely to Exchange Lemon.

(a) Exchange Lemon Made a Timely Demand for Jury Trial [Tr. p. 7] and Had a Right to the Same on All Issues of Fact. (Rule 38(c), F. R. C. P.)

> "The construction of all written instruments belongs to the Courts. It may become necessary to hear evidence of the surrounding circumstances that fill out the meaning of the words, as well as any local or commercial meanings attached to particular words by usage; *and the ascertainment of this is for the jury.* But, subject to the amplification or the precision of the meaning thus ascertained, it is the duty of the jury to take the construction of the instrument from the Court." (IX Wigmore (3rd Ed.) pp. 522-523, §2556.) (Emphasis added.)

(See also Annotation at 170 A. L. R. 383.)

(b) The District Court Necessarily Determined Factual Issues in Its Decision, Findings and Conclusions.

> "That the instant action is not such a case is clear, for plaintiff [Home Insurance] is engaged in the insurance business and defendant [Exchange Lemon] in the business of marketing citrus products." [Tr. p. 69.]

> "However, defendant [Exchange Lemon] erroneously contends that, as a shipper it is engaged in the transportation trade. The mere fact that one arranges for transportation of property does not mean that such person is engaged in the transportation trade any more than everyone who has a bank account could be deemed to be engaged in the banking trade within the meaning of the rule." [Tr. p. 70.]

Although it does not expressly appear in the pleadings that Exchange Lemon is "in the business of marketing citrus products," that fact may be assumed for purposes of argument. Nevertheless, nowhere in the record does it appear that, this is the *only* trade in which Exchange Lemon is engaged. The only stipulation of fact in this regard in the Pretrial Order is that Exchange Lemon "is a California corporation authorized to and actually engaged in business in the State of California." [Tr. p. 17.]

The factual determination that Exchange Lemon is not engaged in the transportation trade is the fundamental factual postulate upon which the erroneous decision of the District Court is predicated. The determination of that critical *factual* issue by the Court, and its consequent refusal to submit such issue to a jury is the essence of the error complained of.

The District Court by the very nature of its decision purports to lift itself by its own boot straps, *i. e.*, it refuses to impanel a jury or allow the introduction of any evidence because there are no issues of fact; the reason that no evidence can be introduced is that trade usage as claimed in the pleadings cannot be shown; and trade usage cannot be shown because *as a matter of fact* the trial court finds that Exchange Lemon is not engaged in the transportation trade.

(c) Exchange Lemon's Offer of Proof Demonstrates the Error in the District Court's Refusal to Admit Evidence or Impanel a Jury.

Although the decision of the trial court excluding the introduction of *any* evidence left Exchange Lemon in a position to set forth on appeal any statement of proposed or claimed proof which it might desire, Exchange Lemon nonetheless made a written offer of proof in the form of the statements of its proposed witnesses substantially as taken in the course of trial preparation. A review of those statements will demonstrate not only the existence of a factual issue regarding the question of whether Exchange Lemon was engaged in the transportation trade, but strong evidence indicating a contrary conclusion to that reached by the trial court.

First, as to the existence of a trade as among shippers of goods (as distinguished from carriers) there is the following testimony:

> "Q. Mr. Borden, are there other persons situated similarily to yourself, that is, traffic managers, with other companies? A. Yes; all large shippers have traffic managers or persons performing such duties.
>
> Q. Are there any associations or trade organizations of traffic or transportation personnel? A. Yes. Traffic clubs, transportation clubs.
>
> Q. Are those on a local or national level? A. They are on both. Local clubs are generally affiliated with the Associated Traffic Clubs of America.
>
> Q. Are there any trade publications of the transportation trade? A. Yes; the chief of which is the Traffic World.
>
> Q. Is that a national publication? A. It is.

Q. What does it contain? A. It contains court decisions, decisions of the Interstate Commerce Commission, and pertinent facts and information relative to different modes and types of transportation which is of interest to the traffic man only." [Tom Borden, Tr. p. 46.]

"Q. Is your type of business such that there is an association or grouping of transportation men, that is, is it an occupation or trade which has men in similar positions in other companies? A. Yes.

Q. And do you have associations of traffic men in the United States? A. We have the national organization known as the National Industrial Traffic League and the membership of that league is composed of men who occupy positions similar to mine in other companies throughout the United States.

Q. Are there any publications put out particularly for or by the traffic men? A. Well, the league puts out a weekly bulletin showing important happenings in the transportation field during that week and they also put out another publication called the Legislator which deals with changes in legislation affecting transportation. The Traffic World is a national publication devoted to transportation and is largely read by the traffic men throughout the country." [Connelly, Tr. p. 52.]

The fact that Exchange Lemon is engaged in the transportation trade as a shipper is fully demonstrated by Mr. Borden's testimony:

"Q. *During the period from 1941 to the present, was Exchange Lemon Products Company engaged in the transportation trade?* A. *Yes.*

Q. Would you amplify that answer. A. By way of illustration, in 1953 we shipped approximately 950

cars of products in interstate commerce by rail carriers; in 1946, 125 cars." (Emphasis added.) [Tr. p. 47.]

It thus appears that the trial court in reaching its conclusion that evidence of trade usage was inadmissible, had to make a factual determination squarely contrary to the testimony in Exchange Lemon's offer of proof. That offer showed unequivocally that Exchange Lemon was engaged in the transportation trade. In view of the demand for jury trial, it is submitted that it was error for the trial court to make the factual determination of this critical question.

2. The Court Erred in Refusing to Allow Evidence on the Issue of Trade Usage.

The allegations of Paragraph II of the Amended Answer [Tr. p. 8] and of Paragraph IV of the Amended Counterclaim [Tr. p. 12] set forth the trade usage of the term "due course of transit" as used in the insurance policy in question. It is a well established rule, and one with which the district court did not disagree, that evidence may be introduced to establish trade meaning of particular terms for the purpose of interpreting the language of a contract. (Cal. Civ. Code, §§1644, 1645; *Callahan v. Stanley,* 57 Cal. 476; *Ross v. Frank W. Dunne Co.,* 119 Cal. App. 2d 690, 697, 260 P. 2d 104 (1953); Wigmore on Evidence (3d Ed., §2463), even where such trade usage is squarely contrary to the normal usage of the terms involved. (*Ermolieff v. RKO Radio Pictures,* 19 Cal. 2d 543, 122 P. 2d 3).)

(a) Exchange Lemon Is Engaged in the Transportation Trade.

The District Court, while apparently agreeing with the foregoing general principle, limits the rule regarding trade usage to a case where "both parties are engaged in that trade." [Tr. p. 69.] The Court then disposes of the applicability of the rule to this case by concluding *as a factual matter* that Home Insurance is engaged in the insurance business and Exchange Lemon is engaged in the business of marketing citrus products. [Tr. p. 69.] However true this may be as a general statement of the primary businesses of the parties, it does not foreclose inquiry as to whether, in the conduct of that primary business, they are not also engaged in several specific trades, including the transportation trade. The offer of proof, and particularly the direct affirmative statement by Mr. Borden above quoted [Tr. p. 47], must be taken for purposes of this appeal as establishing that Exchange Lemon is engaged in the transportation trade as a shipper. That such a trade actually exists is sustained by the testimony of Mr. Borden and Mr. Connelly. [Tr. pp. 46, 52.]

(b) Home Insurance, as an Insurance Company, Is Charged With Knowledge of the Usages of the Trade Insured.

This rule is succinctly stated at 25 Corpus Juris Secundum, Custom and Usage at page 87, as follows:

> "It is settled that insurance companies are bound to inform themselves of the usages of the particular business insured, and that there is a conclusive presumption of their knowledge of such usages, provided the usage is general and of universal notoriety in the trade where the insurance is effected . . . Underwriters insuring by certain words are presumed

> to know and to contract with reference to the mercantile meaning of the words in the particular trade. Such meaning may be local, but must be in force among persons engaged in the trade. The policyholder is not chargeable with general customs of insurance companies, and, likewise, the usages of particular insurers must be shown to have been known in order to be binding on the insured. . . ."

The policy involved is denominated "Transportation Policy" [Tr. p. 22] and deals with the insurance of goods of a shipper in the transportation trade.

(c) Home Insurance Had Actual Knowledge of the Trade Usage.

Wholly apart from the question of whether Exchange Lemon was engaged in the transportation trade and whether Home Insurance is chargeable with the usages of that trade, it appears clearly from the offer of proof that James S. Jennings, agent of Home Insurance [Tr. pp. 17 (Pretrial Order) and 60], was "a traffic expert" [Tr. p. 61], based upon his many years of experience in the transportation trade *as a shipper*. [Tr. pp. 61-62.] It further appears from Mr. Jennings' testimony that he was familiar with the term "storage in transit" [Tr. p. 62] and in fact discussed its meaning with representatives of Exchange Lemon. [Tr. p. 64.] It appears from Mr. Borden's testimony in the offer of proof that Mr. Jennings not only knew of the trade meaning of the term but negotiated the policy in light of that meaning. [Tr. pp. 39-41.]

3. The Court Erred in Refusing to Allow Evidence on the Issue of Ambiguity.

One of the stipulated issues set forth in the pretrial order was: "Was there any ambiguity in the terms of the policy defining the coverage afforded thereby?" [Tr. p. 21.] The trial court found that "the language of the contract is unambiguous and is fairly susceptible of but one interpretation." [Tr. p. 72.]

(a) The Insurance Contract Was Ambiguous on Its Face.

The critical insuring language in the contract is as follows:

> "This policy also covers while on docks, wharfs, piers, bulkheads, in depots, warehouses, stations and/or on platforms, but only while in due course of transit and not if such property is in storage."

There is an inherent incompatibility between the terms "in warehouses" and "in due course of transit and not . . . in storage" if those terms are taken in their normal sense. The use of coverage in a "warehouse" necessarily denotes storage in the ordinary sense of that term. It is not a part of what might ordinarily be considered "due course of transit." It is the position of Exchange Lemon that as a matter of law the insurance contract was ambiguous on its face in this regard and that Exchange Lemon was entitled to introduce evidence of an extrinsic nature to cure that ambiguity.

(b) The Ambiguity Was Emphasized by the Home Insurance's Pleadings.

Home Insurance, in its Answer to the Amended Counterclaim has furnished the Court with the clear demonstration of the ambiguity. In the second defense in that answer, Home Insurance alleges that the policy involved in this action provides in its terms (reading stricken words but omitting italics):

> "This policy covers ~~only~~ while the ~~property~~ insured *property* is in the due course of transit ~~in the custody of:~~
>
> ~~(a) Any railroad or railroad express company and connecting conveyances.~~
>
> ~~(b) This policy also covers any movement by truck from warehouses or factories to points of leading, freight cars or freight depots.~~ *on any truck, trailer, railroad car, or other conveyance, whether such vehicle is owned by the assured or not.*
>
> "This policy also covers while on docks, wharves, piers, bulkheads, in depots, *warehouses,* stations and/or on platforms, ~~but only while in the custody of a common carrier incidental to transportation.~~ *but only while in due course of transit and not if such property is in storage."* [Tr. p. 15.]

The changes (indicated in italics) represent the actual language of the policy in question. [Tr. p. 23.] Of primary significance is the addition of the word "warehouses" to the places where insurance covers. Also of significance is the fact that no requirement is made that the goods be in the custody of the carrier or that they

be held "incidental to transportation." All of these changes indicate the usage of the terms "in due course of transit but not while such property is in storage" in some peculiar or unusual meaning. That meaning can be reconciled only by the introduction of extrinsic evidence relating to the trade usage.

(c) An Insurance Policy Is to Be Construed Against the Insurer in the Event of Ambiguity.

(See 44 C. J. S. (Insurance §297(c)) p. 1166.) It further clearly appears from the offer of proof that the particular language of the insurance policy which is in question was actually written by Mr. Jennings, the agent of Home Insurance, who stated "I typed up this form that has been typed on that policy by the Home." [Tr. p. 65.]

(d) Exchange Lemon Offered Evidence to Cure the Ambiguity.

The following testimony is contained in the offer of proof with relation to the meaning of the term "transit" in the transportation trade:

> "Q. Mr. Borden, is there any peculiar trade usage or meaning in the transportation trade of which you are aware for the term 'transit' or 'in transit'? A. Yes.
>
> Q. Would you state what that meaning is? A. The term is used generally to apply to goods shipped or held pursuant to transit provision of the railroad freight tariffs which are lawfully on file with the Interstate Commerce Commission. Thus, goods are referred to in the trade as being in transit until they reach their final destination, from point of origin to final destination." [Tr. p. 47.]

"Q. Mr. Connelly, among traffic men engaged in the trade, is there any generally accepted usage of which you are aware for the term 'transit' or 'in transit'? A. Yes, we generally use and interpret the word 'transit' as meaning goods shipped subject to the transit privilege.

Q. Would you explain briefly what you refer to by 'transit privilege'? A. Yes. I will take grain, for example, and transport the grain to a storage or milling point and under the railway tariffs the shipper is privileged to unload the grain and record the inbound freight bill covering that grain for what is known as a transit privilege. Under the transit privilege, the shipper or owner of the grain can mill the grain or clean it or something of such sort and then reship it to another destination and, under the tariff governing the transit privilege, the shipper is accorded the through rate from the origin of the grain to the final or ultimate destination. The tariffs sometimes make a charge for the privilege and sometimes no charge is made, depending on the circumstances.

Q. Is the transit privilege restricted to stoppage for processing or reprocessing of the goods? A. No. Transit privileges cover a wide number of uses at the stoppage point. I would say the fabrication of iron and steel articles, or storage of canned goods, are among other normal transit uses. The transit privileges cover a host of different operations at the transit point. The particular transit privilege is dependent upon the provisions of the specific applicable tariff.

Q. To your knowledge, Mr. Connelly, is this trade usage of the term 'transit' of general and widespread notoriety among traffic men? A. Yes.

Q. At this time I would like to ask you a hypothetical question—that is, a question based on a hypothetical set of facts, which I would like you to answer on the basis of your experience and knowledge in the specialized transportation field in which you work.

Assume that X Company is a California shipper of substantial quantities of consumer goods throughout the United States. Y Company, in Chicago, is one of the major customers of X Company. Y Company is the only customer for the particular goods which it purchases from X Company, at least in the container here involved. Assume further that X Company ships a large quantity of the product normally sold to Y Company, together with some other general consumer goods, to a warehouse in Kansas City. All of the goods are shipped on bills of lading naming X Company as consignee and are marked 'Registered for Storage in Transit.' These goods are unloaded in Kansas City, are registered with the carrier's agent as subject to transit privileges contained in the applicable tariff. Assume that they have remained in the warehouse for eight to twelve months and no shipping instructions have been received, there being a two-year limit on the transit privilege in the applicable tariff.

Now, with those facts in mind, assume that it becomes material to determine whether the goods in question are 'in due course of transit.' As the term is used and understood generally in the transportation trade, can you state, in your opinion, whether those goods are 'in due course of transit'? A. I would say that the goods are 'in transit' since the goods were properly registered under the tariffs for the transit privilege." [Tr. pp. 52-55.]

Conclusion.

For the foregoing reasons, and on the grounds herein set forth, Appellant Exchange Lemon Products Company respectfully prays that this Court reverse the judgment heretofore entered and instruct the trial court to submit to a jury the factual issues raised by the pleadings herein.

Dated May 16, 1955.

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APPENDIX.

Defendant's Contentions of Fact (From Pretrial Memorandum).

Exchange Lemon Products Company is a farmers' cooperative in the Sunkist group, which receives, processes and markets at its plant in Corona, California, all of the lemons of its members that are not sold in fresh fruit channels. In the years up until the summer of 1951, one of the largest and best outlets for these lemons was in the form of concentrated lemon juice. By 1951 the new market for the consumer packed lemon juice and lemonade products, frozen and unfrozen, had only begun to develop.

Insofar as concentrated lemon juice was concerned, there was one major customer in the United States. That customer was Puritan Company of America, distributors of ReaLemon bottled single strength lemon juice. The juice for this account was concentrated in California by Exchange Lemon Products Company, packaged in 50 gallon barrels containing preservative and shipped to Chicago where the product was reconstituted to single strength juice.

Lemon production is such that it is necessary to process a substantial portion of the annual crop in the late summer, fall and winter months when there is very little immediate market for the product. This processing was customarily done for the account of established customers but before actual quantities and delivery dates had been received.

Two problems arising from this late summer and fall production and processing of lemon juice products are of significance to this case. First, due to limited storage

facilities at the Corona plant, a very considerable problem was created in the storage of this volume of products between the time of its production and the time when it would be delivered to the customer for use the following spring and summer. Secondly, the seasonal nature of the demand for lemon products created a shipping problem in that the major purchasers were located in Chicago and other eastern markets, and a shortage of freight cars on western railroads often unduly delayed direct shipments to customs at the time of the seasonable demand.

During the latter part of January or first of February, 1946, James S. Jennings, an agent of The Home Insurance Company, contacted Mr. Tom Borden, Traffic Manager of Exchange Lemon Products Company, regarding a revision of the transportation insurance of the company.

In connection with the storage and shipping problem mentioned above, Mr. Jennings suggested to Mr. Borden that sooner or later Exchange Lemon Products Company would find it to its advantage to utilize the transit privileges provided in the railroad freight tariffs as approved by the Interstate Commerce Commission. In substance, Mr. Jennings stated: "With storage in transit, you'll be able to solve some of your warehouse problems here by not having to keep so much on hand in Corona, yet you'll have sufficient stocks strategically located for final distribution." He then indicated to Mr. Borden that the insurance policy which he proposed would cover the goods from the company's plant until they reached the customer.

Mr. Jennings and Mr. Borden were both fully aware of the provisions of the existing railroad freight tariffs and of the customs, practices and terminology of the transportation trade.

Transit privileges, or "stopping in transit privileges" or "storage in transit" or "transit" are all methods of expressing in the trade the privileges provided in the freight tariffs generally, as exemplified and particularly applicable to this case in Western Trunk Lines' Freight Tariff No. 403B. Briefly, the privilege is one of shipping goods to an intermediate point where they may be taken out of the railway car, stored or processed, and then continued on their shipment to the customer with the shipper being granted the benefit of the through rate on the entire shipment. In order to take advantage of this privilege, the shipper must register the goods as transit goods, and records thereof must be kept by the agency established for that purpose—in this case, Western Weighing and Inspection Bureau, at Kansas City.

It is customary usage in the transportation trade to refer to goods which have been shipped pursuant to such tariff provisions as "transit" goods. The term "transit" in this sense describes the goods not only while they are actually traveling on the railroad car but also while they are stopped in transit pursuant to the tariff provisions. In the trade, goods are not generally viewed as in "storage" until they have reached a final destination or customer.

This distinction is not based upon a physical difference in the warehousing facilities but rather upon the manner in which the goods are being and are intended to be handled. Thus, the defendant's claim under the insurance policy in this matter is based upon the destruction of transit goods which were held in Crooks Terminal Warehouse in Kansas City. At the same time there was a certain quantity of goods in the same warehouse which had been shipped for local Kansas City distribution and,

therefore, was in destination storage. No claim is made for these latter goods, which were physically segregated in the warehouse from the transit goods.

On the basis of notes taken by Mr. Jennings at his meeting with Mr. Borden, the typewritten portion of the policy in question was prepared by Mr. Jennings. When the policy was received by Mr. Borden, he read it and found it to be in accordance with his understanding, to-wit, the policy provided that it insured goods against the enumerated risks, including flood, and while in "warehouse," if in the due course of transit but not if such goods are in storage.

Thereafter, Exchange Lemon Products Company commenced to ship its products to such midwestern centers as Omaha, Dallas, and Kansas City, registered for storage in transit, prior to transshipment to ultimate destination in Chicago., New York and other eastern markets. On July 13, 1951, there were substantial stocks of lemon juice products stored in Crooks Terminal Warehouse in Kansas City, Missouri. The flood which inundated the warehouse on that day destroyed $161,991.63 worth of transit goods. Of this amount, in excess of $128,000.00 worth of the transit goods consisted of barreled concentrated lemon juice which was labeled for delivery to Puritan Company of America in Chicago.

Defendant's claim of loss for these transit goods under the policy was objected to by plaintiff who commenced this action to establish the question of liability or non-liability. Damages are stipulated, the sole question being one of interpretation of the contract. In connection with the interpretation and construction of the contract, defendant relies upon the aforesaid trade meaning of the word "transit."